

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

DAVID O'DONNELL

Plaintiff,

v.

**JUAN PABLO ZAVALA DIAZ,
AVIS BUDGET CAR RENTAL, LLC
and JOHN DOE**

Defendants.

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CIVIL ACTION NO. 3:17-cv-1922

NOTICE OF REMOVAL

TO THE HONORABLE UNITED STATES DISTRICT COURT:

Defendant AvisBudget Car Rental, LLC (hereinafter "Defendant Avis Budget"), files this Notice of Removal and respectfully show the Court the following:

1. On or about November 7, 2016, an action was commenced against Defendant in the 298th District Court, Dallas County, Texas entitled *David O'Donnell v. Juan Pablo Zavala Diaz, AvisBudget Car Rental, LLC, Chadwick Samuel Moffett, and John Doe*, with the assigned cause number of DC-16-14431. The following documents are exhibits which are incorporated herein:

- State Court's certified docket sheet is attached as Exhibit A;
- Index of State Court records is attached as Exhibit B; and the following State Court records:
 - Letter from Plaintiff's counsel to State Court Clerk dated November 7, 2016 is attached as Exhibit B-1;
 - Civil Case Information Sheet is attached as Exhibit B-2;

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- Plaintiff's Original Petition filed in State court is attached as Exhibit B-3;
- Citation issued to AvisBudget Car Rental, LLC is attached as Exhibit B-4;
- Citation issued to Chadwick Samuel Moffett is attached as Exhibit B-5;
- Citation issued to Juan Pablo Zavala Diaz through Texas Chairman of the State Highway and Public Transportation Commission is attached as Exhibit B-6;
- Officer's Return of Citation to Avis Budget Car Rental, LLC, is attached as Exhibit B-7;
- Officer's Return of Citation to Juan Pablo Zavala Diaz through the Texas Department of Transportation is attached as Exhibit B-8;
- Defendant Avis Budget Car Rental, LLC's Original Answer is attached as Exhibit B-9;
- Defendant Avis Budget Car Rental, LLC's Special Exceptions is attached as Exhibit B-10;
- Plaintiff's Notice of Filing Certified Copy of Police Report is attached as Exhibit B-11;
- Plaintiff's Notice of Change of Address for Plaintiff's counsel is attached as Exhibit B-12;
- Officer's Return of Citation to Chadwick Samuel Moffett is attached as Exhibit B-13;
- Defendant Chadwick Samuel Moffett's Original Answer is attached as Exhibit B-14;
- Demand for Jury by Defendant Chadwick Samuel Moffett is attached as Exhibit B-15;
- Letter from Texas Department of Transportation to Juan Pablo Zavala Diaz, Calle Independencia #317, Barcelona, Spain is attached as Exhibit B-16;
- Plaintiff's Notice of Filing Affidavits (Dr. Stone) is attached as Exhibit B-17;
- Court's letter to Katherine Knight regarding Jury Trial is attached as Exhibit B-18;

- Court's letter to Carlos A. Baldido regarding Jury Trial is attached as Exhibit B-19;
- Court's letter to James Scott Perry regarding Jury Trial is attached as Exhibit B-20;
- Court's letter to file copy regarding Jury Trial is attached as Exhibit B-21.
- Mediation Order is attached as Exhibit B-22;
- Joint Notice of Agreed Substitute Mediator is attached as Exhibit B-23;
- Defendant AvisBudget Car Rental, LLC's Motion to Compel Plaintiff's Responses to Written Discovery is attached as Exhibit B-24;
- Defendant AvisBudget Car Rental, LLC's Notice of Hearing is attached as Exhibit B-25;
- Defendant AvisBudget Car Rental, LLC's First Amended Notice of Hearing is attached as Exhibit B-26;
- Plaintiff's Notice of Filing Affidavits is attached as Exhibit B-27;
- Defendant AvisBudget Car Rental, LLC's Motion for Continuance is attached as Exhibit B-28;
- Defendant AvisBudget Car Rental, LLC's proposed Order Granting Continuance is attached as Exhibit B-29;
- Defendant AvisBudget Car Rental, LLC's Notice of Hearing on Motion for Continuance is attached as Exhibit B-30;
- Defendant AvisBudget Car Rental, LLC's Supplement to Certificate of Conference attached as Exhibit B-31;
- Defendant AvisBudget Car Rental, LLC's Supplement to Motion to Compel attached as Exhibit B-32;
- Proposed Agreed Order of Partial Dismissal with Prejudice is attached as Exhibit B-33;
- Notice regarding Comments: Associate Judge's Decision with attached signed Order on Defendant AvisBudget Car Rental, LLC's Motion to Compel and facsimile confirmation sheets is attached as Exhibit B-34;

- Order on Defendant AvisBudget Car Rental, LLC's Motion to Compel Plaintiff's Discovery Responses is attached as Exhibit B-35;
- Order of Dismissal with Prejudice regarding Defendant Chadwick Samuel Moffett is attached as Exhibit B-36;
- Defendant AvisBudget Car Rental, LLC's First Amended Motion for Continuance is attached as Exhibit B-37;
- Defendant AvisBudget Car Rental, LLC's Objections to and Motion to Strike Affidavits is attached as Exhibit B-38;
- Defendant AvisBudget Car Rental, LLC's Notice of Hearing on Motion for Continuance and Motion to Strike Affidavits is attached as Exhibit B-39;
- Defendant AvisBudget Car Rental, LLC's Motion to Strike Plaintiff's Designation of Experts is attached as Exhibit B-40;
- Defendant AvisBudget Car Rental, LLC's Notice of Filing Affidavit regarding Certified Crash Report is attached as Exhibit B-41;
- Defendant AvisBudget Car Rental, LLC's Motion for Summary Judgment is attached as Exhibit B-42;
- Proposed Interlocutory Default Judgment is attached as Exhibit B-43;
- Defendant AvisBudget Car Rental, LLC's First Amended Original Answer is attached as Exhibit B-44;
- Defendant AvisBudget Car Rental, LLC's Notice of Hearing on Motion to Strike Plaintiff's Designation of Experts is attached as Exhibit B-45;
- Plaintiff's Notice of Filing Affidavit is attached as Exhibit B-46;
- Defendant AvisBudget Car Rental, LLC's Amended Notice of Filing Affidavit (Tx Dot Crash Report – redacted] is attached as Exhibit B-47;
- Affidavit of William Davidson, Litigation Consultant, Sedgwick Claims Management Services, Inc., authorized third party administrator for Defendant AvisBudget Car Rental, LLC, is attached as Exhibit C, and incorporated herein;

- Certificate from Texas Transportation Department regarding returned mail to Defendant Zavala Diaz is attached as Exhibit D, and incorporated herein.
- Certified copy of the police report is attached hereto as Exhibit E.

A. *Statement of Jurisdiction*

2. Removal of a civil action from state court to federal court is governed by 28 U.S.C. § 1441, et seq. Section 1441(a) states:

Any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to which the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a).

3. This case is removable pursuant to this Court's diversity jurisdiction. Title 28 of the United States Code Section 1332 describes the diversity jurisdiction of the U.S. District Courts, as follows:

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000.00, exclusive of interest and costs, and is between -

(1) citizens of different States.

28 U.S.C. § 1332. This case is between citizens of different states, and thus the Court has original jurisdiction over this matter pursuant to the diversity of the parties.

- A. Plaintiff David O'Donnell claims to be a Texas citizen.
- B. Former Defendant Chadwick Samuel Moffett ("Former Defendant Moffett") is a Texas resident. Former Defendant Moffett was dismissed as a party defendant on June 20, 2017. See Exhibit B-36.
- C. Defendant AvisBudget is a Delaware limited liability company with its

principal place of business in Parsippany, New Jersey.¹ See Exhibit C. The sole member of Defendant AvisBudget is AvisBudget Holdings, LLC, a Delaware limited liability company with its principal place of business in New Jersey. See Exhibit C. The sole member of AvisBudget Holdings, LLC is Cendant Finance Holding Co., LLC, a Delaware limited liability company with its principal place of business in New Jersey. See Exhibit C. The sole member of Cendant Finance Holding Co., LLC, is AvisBudget Group, Inc., a Delaware corporation with its principal place of business in New Jersey. See Exhibit C. Therefore, Defendant AvisBudget is a citizen of Delaware and of New Jersey.

- D. Defendant Zavala Diaz is a citizen of Spain. See Exhibit B-3, Plaintiff's Original Petition, para II; See Exhibit E.
- E. Defendant John Doe (whom Plaintiff contends is the employer of Defendant Zavala Diaz) need not consent in the removal. Pursuant to 28 U.S.C. §1441(b)(1), for purposes of determining diversity, the citizenship of defendants sued under fictitious names is disregarded. Therefore, Defendant John Doe's citizenship is irrelevant to any diversity analysis.

4. Because Defendant Moffett has been dismissed from this litigation pursuant to order of the state court, the parties are completely diverse and within the diversity jurisdiction of the Court.

- 5. In his Original Petition, Plaintiff states that he seeks monetary relief of over

¹ Plaintiff alleges that Defendant AvisBudget "is a non-resident corporation located at 6 Sylvan Way, Parsippany, New Jersey." See Exhibit B-3, para. II.

\$200,000. See Exhibit B-3, paragraph I. Accordingly, removal is proper under 28 U.S.C. §§ 1332, 1441 and 1446 due to the existence of diversity and the amount in controversy exceeding \$75,000.

6. This Notice of Removal is filed within thirty (30) days of Defendant AvisBudget's receipt of the State Court's Agreed Order of Partial Dismissal With Prejudice, dismissing Defendant Moffett, dated June 20, 2017, and is therefore timely filed pursuant to 28 U.S.C. §1446(b)(3).

B. Service of Process

7. Defendant AvisBudget first received Plaintiff's Original Petition through service of the Citation and Petition on or about November 17, 2016.

8. As previously discussed, co-Defendant Chadwick Samuel Moffett, a purported Texas resident, was dismissed as a party on June 20, 2017. See Exhibit B-36.

9. Service on Defendant Juan Pablo Zavala Diaz ("Defendant Zavala Diaz") was attempted through the Chairman of the State Department of Highways and Public Transportation (now the Texas Department of Transportation, hereinafter "TxDot") on November 14, 2016. See Exhibit B-6. Defendant Zavala Diaz has not made an appearance in this case. On or about November 17, 2016, TxDot attempted to notify Defendant Zavala Diaz of the citation and petition by registered mail. See Exhibit B-16. However, the registered mail was returned to TxDot undelivered. See Exhibit D.

10. Defendant John Doe has been neither identified nor served with process.

C. Consent of Defendants to Removal Not Required

11. In the present case, Defendant Moffett was dismissed as a party on June 20, 2017, and need not consent to the removal. See Exhibit B-36.

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12. Likewise, John Doe has not been served and need not consent in the removal.

13. Furthermore, the consent of Defendant Zavala Diaz is not required because Defendant Zavala Diaz has not been properly served and joined to this suit.

14. More specifically, Defendant Zavala Diaz is a citizen of Barcelona, Spain. See Exhibit B-3, Plaintiff's Original Petition, para II; Exhibit E. Plaintiff originally attempted to serve Defendant Zavala Diaz pursuant to Tex. R. Civ. Proc. 17.062 by serving the Chairman of the State Highway and Public Transportation Commission. See Exhibit B-8. TxDot sent a letter to Defendant Zavala Diaz forwarding citation and a copy of the Petition by registered mail. See Exhibit B-16. Notably, the registered mail was returned unopened, thus the process was not actually received by Defendant Zavala Diaz. See Exhibit D.

15. Section 17.063 of the Texas Civil Practice and Remedies Code provides that nonresidents may be served as follows:

(d) After the chairman deposits the copy of the process in the mail, it is presumed that the process was transmitted by the chairman and received by the nonresident or agent. The presumption may be rebutted.

Tex. Civ. Prac. & Rem. Code Sec. 17.063(d). (emphasis added). Thus, TxDot's letter to Defendant Zavala Diaz raises the rebuttable presumption that service of process was received by Defendant Zavala Diaz. This presumption is easily rebutted by the fact that the registered mail was returned unopened, thus it is undisputed process was not received. See Exhibit D. Plaintiff has made no other attempts to serve Defendant Zavala Diaz. Accordingly, Defendant Zavala Diaz has not been properly joined and served in this action, and his consent is not required under 28 U.S.C. §1446(b)(2)(A).

16. With regard to substituted service on the chairman, the Texas Civil Practice and Remedies Code further provides:

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Sec. 17.065. FAILED SUBSTITUTED SERVICE. (a) If the notice of service on the chairman cannot be effected by registered or certified mail or if the nonresident or agent refuses to accept delivery of the notice, the plaintiff may have the defendant personally served with a certified copy of the process and a notice stating that the chairman has been served and the date on which he was served.

(b) The return of service under this section must:

- (1) state when it was served;
- (2) state on whom it was served; and
- (3) be signed under penalty of perjury by the party making the service;

(c) The process and notice may be served by any disinterested person competent to make an oath that the process and notice were served.

Tex. Civ. Prac. & Rem. Code Sec. 17.065(a)-(c) (emphasis added). Here, instead of following up with personal service of a certified copy and the prescribed notice, Plaintiff elected to do nothing. Accordingly, because service of process through the chairman was never received by the nonresident and Plaintiff has made no other attempts at service, Defendant Zavala Diaz has not been properly served and joined to this litigation, and his consent is not required.

17. Written notice of the filing of this Notice of Removal has been given to all parties herein, and a copy of this Notice has been filed with the District Clerk of Dallas County, Texas.

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18. Pursuant to this Court's Local Rules, a Civil Cover Sheet and a Supplement to JS 44 Civil Cover Sheet for cases removed from state district court are filed herewith.

WHEREFORE, Defendant respectfully removes this action from the 298th District Court of Dallas County, Texas, to this Court on or about July 19, 2017, pursuant to 28 U.S.C. §§1332, 1441 and 1446.

Respectfully submitted,

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**ATTORNEYS FOR DEFENDANT
AVISBUDGET CAR RENTAL, LLC**

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of July, 2017, a true and correct copy of the foregoing was served on the following counsel of record:

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By Electronic Service

/s/Katherine Knight
Katherine Knight

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